A

TETUAN BEE LING & CO

lwn.

VIJENDRAN PONNIAH

B

MAHKAMAH RAYUAN, PUTRAJAYA
HELILIAH MOHD YUSOF HMP
SULAIMAN DAUD HMR
T SELVENTHIRANATHAN HMR
[RAYUAN SIVIL NO: W-02-5-2002]

C

13 MEI 2010

TORT: *Pendakwaan niat-jahat - Petisyen kebankrapan - Kecederaan kepada reputasi - Ganti rugi - Sama ada prosiding kebankrapan dimulakan secara niat-jahat dan tanpa sebab munasabah dan mungkin -*

D *Sama ada prosiding tersebut suatu penyalahgunaan proses mahkamah*

PROSEDUR SIVIL: *Penyalahgunaan proses - Prosiding kebankrapan - Kecederaan kepada reputasi - Ganti rugi - Sama ada prosiding kebankrapan dimulakan secara niat-jahat dan tanpa sebab munasabah dan mungkin - Sama ada prosiding tersebut suatu penyalahgunaan proses*

E *mahkamah*

PROSEDUR SIVIL: *Penghakiman - Penghakiman ingkar - Keesahan - Prosiding kebankrapan dimulakan menurut penghakiman ingkar - Sama ada sesuatu penghakiman ingkar adalah suatu penghakiman yang baik*

F *sehingga diketepikan*

PROFESION UNDANG-UNDANG: *Tatatertib profesional - Kelakuan peguambela dan peguamcara dalam keupayaan profesional - Prosiding kebankrapan - Pendakwaan niat-jahat - Penyalahgunaan proses*

G

Ini adalah rayuan oleh perayu/defendan kedua terhadap keputusan hakim Mahkamah Tinggi ('hakim bicara') yang telah membenarkan tuntutan responden/plaintif bagi ganti rugi atas kausa tindakan pendakwaan niat-jahat sivil dan penyalahgunaan proses. Defendan kedua merupakan sebuah firma guaman yang telah dilantik oleh

H defendan pertama untuk menggantikan peguam pertamanya. Atas arahan defendan pertama, defendan kedua memulakan prosiding kebankrapan terhadap plaintif menurut suatu penghakiman ingkar yang telah dimasukkan terhadap plaintif berkenaan dengan sesuatu

I hutang yang kena dibayar oleh plaintif kepada defendan pertama. Plaintif, setelah berjaya mendapatkan penghakiman ingkar tersebut dibatalkan dan notis kebankrapan yang difailkan terhadapnya oleh

defendan kedua diketepikan, memulakan tindakan untuk mendapatkan ganti rugi terhadap defendan-defendan atas dua kausa tindakan, iaitu, pertama, defendan-defendan telah secara niat-jahat dan tanpa sebab munasabah memulakan prosiding kebankrapan terhadapnya di bawah Akta Kebankrapan 1967, dan, kedua, bahawa prosiding kebankrapan yang telah dibawa dan diteruskan itu adalah suatu penyalahgunaan proses mahkamah dengan niat-jahat untuk mencemarkan reputasi plaintif dan tidak atas alasan sah dan munasabah. Hakim bicara memutuskan bahawa plaintif telah berjaya membuktikan prosiding kebankrapan tersebut dimulakan tanpa sebab munasabah dan mungkin, dan juga bahawa prosiding tersebut adalah suatu penyalahgunaan proses. Oleh yang demikian, rayuan semasa oleh defendan kedua.

Diputuskan (membenarkan rayuan)
Oleh Sulaiman Daud HMR menyampaikan penghakiman majoriti mahkamah:

(1) Asas tindakan plaintif adalah kecederaan kepada reputasinya yang disebabkan oleh pengeluaran notis kebankrapan dan pengemukaan petisyen pemiutang tanpa sebab munasabah dan mungkin. Oleh itu, tarikh material bagi menentukan sama ada terdapat sebab munasabah dan mungkin untuk berbuat demikian adalah tarikh notis atau petisyen itu dikemukakan kerana pada lazimnya tindakan mengiklankan notis dan petisyen tersebut, yang dilakukan pada permulaan prosiding itu, yang menyebabkan pencemaran nama baik seseorang itu. Di sini, hakim bicara tersilap apabila terlalu memberi tumpuan kepada pengetepian penghakiman ingkar tersebut yang, di atas fakta-fakta, ternyata telah berlaku hanya selepas pemfailan petisyen tersebut. Begitu juga, ketidakaturan-ketidakaturan dalam penerusan prosiding kebankrapan itu hanya berkaitan dengan keesahan prosiding itu sendiri, dan tidak dalam menentukan sama ada terdapat sebab munasabah dan mungkin bagi memulakannya, iaitu isu pokok dalam menentukan tindakan sedemikian. (perenggan 24)

(2) Berdasarkan kepada fakta-fakta kes, plaintif telah gagal sama sekali untuk membuktikan pada masa notis kebankrapan dan petisyen pemiutang dikemukakan, defendan kedua sebenarnya tidak mempercayai, atas alasan yang munasabah, terdapatnya alasan yang baik di sisi undang-undang baginya memulakan prosiding kebankrapan tersebut. Ia bertindak atas suatu

penghakiman, walaupun penghakiman ingkar, yang ketika itu masih sah dan tidak dicabar, yang telah dikeluarkan empat tahun sebelumnya. Malahan, permohonan bagi mengetepikan penghakiman itu hanya disampaikan kepada defendan kedua kira-kira enam bulan selepas petisyen pemiutang difailkan. Tambahan lagi, sesuatu penghakiman ingkar adalah suatu penghakiman yang baik sehingga diketepikan dan apabila jumlah di bawah sesuatu penghakiman itu tidak dibayar, maka ia boleh dikuatkuasakan, termasuk dalam bentuk prosiding kebankrapan. (perenggan 25 & 26)

(3) Oleh itu, hakim bicara telah tersilap dan tersalah arah apabila memutuskan plaintif telah berjaya membuktikan bahawa defendan kedua telah memulakan prosiding kebankrapan tersebut tanpa sebab munasabah dan mungkin. (perenggan 27)

(4) Setelah memutuskan bahawa plaintif telah gagal membuktikan elemen yang disebut di atas, maka tiada keperluan untuk meneruskan dengan isu niat-jahat. Namun demikian, setelah meneliti keseluruhan keterangan yang telah dikemukakan, khususnya keterangan defendan kedua sendiri dan surat-menyurat yang berkaitan dengannya, ia adalah jelas bahawa tindakan defendan kedua dalam memulakan prosiding kebankrapan ini terhadap plaintif tidak bermotifkan niat-jahat. Defendan kedua hanya bertujuan untuk mendapatkan semula hutang di bawah penghakiman ingkar tersebut. Jika pun terdapat apa-apa ketidakaturan dalam pengendalian prosiding kebankrapan tersebut oleh defendan kedua, ia tidaklah mencukupi untuk menerbitkan apa-apa inferens niat-jahat terhadapnya. (perengan 30 & 31)

(5) Plaintif tidak mengemukakan apa-apa keterangan bagi menunjukkan bahawa tujuan defendan kedua memulakan prosiding itu terhadapnya bagi pihak defendan pertama adalah untuk tujuan mencederakan atau mencemarkan reputasi plaintif sebagai seorang peguambela dan peguamcara, atau untuk apa-apa tujuan kolateral bagi faedahnya. Perlu ditekankan semula defendan kedua hanya bertindak sebagai peguam dan tiada keterangan yang menunjukkan ia mempunyai apa-apa urusan lain dengan plaintif selain daripada prosiding kebankrapan ini. Daripada fakta-fakta, keputusan hakim bicara yang mendapati defendan kedua bertanggungan kerana penyalahgunaan proses mahkamah juga tidak disokong oleh keterangan yang ada. (perenggan 41)

(6) Kesimpulannya, atas alasan-alasan yang dihuraikan di atas, hakim bicara telah tersalah arah dan tersilap di sisi fakta dan undang-undang apabila mendapati defendan kedua bertanggungan kerana pendakwaan niat-jahat dan penyalahgunaan proses dalam memulakan tindakan kebankrapan yang dipersoalkan terhadap plaintif. (perenggan 42)

Per T Selventhiranathan JCA (dissenting):

(1) On the facts and circumstances, it was the duty of the second defendant to verify the validity of the order upon which it was asked to act. In not doing so, the second defendant acted with such wanton recklessness that it amounted to acting maliciously. Since the default judgment was never served on the plaintiff, it had not crystallized into a final judgment upon which to launch bankruptcy proceedings. Bearing in mind that such proceedings would bring in their wake extremely dire consequences to the party concerned, the second defendant, as responsible advocates and solicitors, should have studied the matter properly before continuing further with the bankruptcy proceedings. Such reckless conduct on the second defendant's part constituted malicious prosecution and was also an abuse of process. Although the second defendant's action could be claimed to be innocent in relation to its state of mind, such action amounted to acting with malice in law. Thus, the trial judge had applied the law correctly to the facts of the case in finding the causes of action against both defendants as having been proved. (paras 60-62 & 66-69)

English/Bahasa Malaysia *Translation of Headnotes*

This was an appeal by the appellant/second defendant against the decision of the High Court judge ('trial judge') allowing the respondent's/plaintiff's claim for damages pertaining to the causes of action of civil malicious prosecution and abuse of process. The second defendant was a legal firm appointed by the first defendant to replace its first solicitor. On the first defendant's orders, the second defendant commenced bankruptcy proceedings against the plaintiff pursuant to a default judgment entered against the plaintiff in relation to a debt payable by the plaintiff to the first defendant. The plaintiff, after succeeding in getting the default judgment struck out and the bankruptcy notice that was filed against him by the second defendant set aside, commenced an action for damages against the defendants on two causes of action *ie*, firstly, that the

defendants had maliciously and without reasonable care commenced bankruptcy proceedings against him under the Bankruptcy Act 1967, and, secondly, that the bankruptcy proceedings brought and continued were an abuse of the process of the court with malicious intent to tarnish the plaintiff's reputation and not on valid and reasonable grounds. The trial judge found that the plaintiff had succeeded in proving that the bankruptcy proceedings were commenced without reasonable and probable grounds, and also that said proceedings were an abuse of process. Hence, the present appeal by the second defendant.

Held (allowing the appeal)
Per Sulaiman Daud JCA delivering the majority judgment of the court:

(1) The basis of the plaintiff's action was the injury to his reputation that was caused by the bankruptcy notice being issued and the presentation of the creditor's petition without reasonable and probable grounds. Thus, the material date for ascertaining whether there were reasonable and probable grounds was the date the notice or petition was presented because it was usually the advertising of the notice and petition, done at the beginning of the proceedings, which tarnishes a person's good name. In this instance, the trial judge erred in focusing too much on the setting aside of the default judgment which, on the facts, clearly occurred after the filing of the petition. Also, the irregularities in the bankruptcy proceedings were only connected to the validity of the proceedings itself, and not in determining whether there were any reasonable and probable grounds to commence them, which was the core issue in deciding such an action.

(2) On the facts of this case, the plaintiff had clearly failed to prove that at the time of the presentation of the bankruptcy notice and creditor's petition, the second defendant actually did not believe, on reasonable grounds, that there were good reasons in law for it to commence the bankruptcy proceedings. It acted upon a judgment, *albeit* a default judgment, that at the time was still valid and unchallenged, issued four years before. In fact, the application to set aside the judgment was only served on the second defendant about six months after the creditor's petition was filed. Additionally, a default judgment is a good

judgment until set aside and when the amount under such judgment has not been paid, it can be enforced, including in the form of bankruptcy proceedings. A

(3) Hence, the trial judge had erred and misdirected himself in deciding that the plaintiff had successfully proven that the second defendant had commenced the bankruptcy proceedings without reasonable and probable grounds. B

(4) After holding that the plaintiff had failed to prove the element mentioned above, there was thus no need to continue with the issue of malice. Even so, after perusing all the evidence adduced, especially the second defendant's own evidence and the correspondence pertaining to it, it was clear that the second defendant's action in commencing these bankruptcy proceedings against the plaintiff was not motivated by malice. The second defendant only intended to recover the debt under the default judgment. Even if there were any irregularities in the conduct of the bankruptcy proceedings by the second defendant, it was insufficient to infer any malice against it. C D

(5) The plaintiff did not adduce any evidence to show that the second defendant's purpose for commencing said proceedings against him on behalf of the first defendant was with the intention of injuring or tarnishing the plaintiff's reputation as an advocate and solicitor, or for any collateral purpose that would benefit it. It had to be stressed again that the second defendant only acted as a solicitor and there was no evidence to show that it had any other dealings with the plaintiff other than these bankruptcy proceedings. From the facts, the trial judge's finding that the second defendant was liable for abuse of the court's process was also not supported by the available evidence. E F G

(6) In conclusion, for the reasons mentioned above, the trial judge had misdirected himself and erred in fact and law in holding that the second defendant was liable for malicious prosecution and abuse of process in commencing the impugned bankruptcy action against the plaintiff. H

Oleh T Selventhiranathan HMR (menentang):

(1) Berdasarkan fakta-fakta dan keadaan-keadaan, ia merupakan kewajipan defendan kedua untuk memastikan keesahan perintah atas mana ia telah diminta bertindak. Dengan tidak berbuat demikian, defendan kedua bertindak dengan kesemberonoan I

A sewenang-wenang yang seumpama menjadikannya tindakan berniat-jahat. Oleh kerana penghakiman ingkar tidak disampaikan kepada plaintif, ia belum membentuk menjadi suatu penghakiman muktamad atas mana prosiding kebankrapan boleh dimulakan. Memandangkan bahawa prosiding sebegitu akan B membawa akibat yang sungguh padah kepada pihak yang terlibat, defendan kedua, sebagai peguambela dan peguamcara yang bertanggungjawab, sepatutnya meneliti perkara tersebut dengan betul sebelum meneruskan dengan prosiding kebankrapan tersebut. Kelakuan yang begitu semberono oleh C defendan kedua merupakan pendakwaan niat-jahat dan juga suatu penyalahgunaan proses. Walaupun tindakan defendan kedua boleh dikatakan tidak bersalah berhubung dengan keadaan mindanya, tindakan sebegitu seumpama bertindak dengan niat-jahat di sisi undang-undang. Oleh yang demikian, hakim D perbicaraan telah menggunapakai undang-undang dengan betul kepada fakta-fakta kes dalam mendapati kausa-kausa tindakan terhadap kedua-dua defendan telah dibuktikan.

Kes-kes yang durujuk:

E *Abrath v. North Eastern Rail Co [1881-1885] All ER Rep 614* ***(dirujuk)***
Goldsmith v. Sperrings Ltd [1977] 2 All ER 566 ***(dirujuk)***
Grainer v. Hill 132 ER 769 ***(dirujuk)***
In re Majory [1955] Ch 600 ***(dirujuk)***
Jacob v. Vockrodt [2007] EWHC 2403 ***(dirujuk)***
Johnson v. Emerson and Sparrow [1871] LR 6 Ex 329 ***(dirujuk)***
F *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA* ***(dirujuk)***
Partizan Ltd v. OJ Kilkenny & Co Ltd [1998] 1 BCLC 157 ***(dirujuk)***
Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(dirujuk)***
G *Quartz Hill Consolidated Gold Mining Company v. Eyre [1883] 11 QBD 674* ***(dirujuk)***
Radivojevic v. LR Industries Ltd [1984] Transcript 514 ***(dirujuk)***
Re: Udos; Ex Parte: Seabanc Kredit Sdn Bhd [1994] 3 CLJ 377 HC ***(dirujuk)***
Rohani @ Hamidah Nor v. Sincere Leasing Sdn Bhd [1993] 1 AMR 225 H ***(dirujuk)***
Shearer v. Shields [1914] AC 808 ***(dirujuk)***
Vijendran Ponniah v. Bank of Commerce [1999] 5 CLJ 69 HC ***(dirujuk)***
Whitworth v. Hall [1824-1834] All ER Rep 484 ***(dirujuk)***

Sumber-sumber yang dirujuk:

I *Halsbury's Law of England,* 4th edn, vol 45.2, para 471

Bagi pihak perayu - Porres P Royen; T/n Shook Lin & Bok
Bagi pihak defendan kedua - Malik Imtiaz Sarwar (Murali Achan & CP Mahendran bersamanya); T/n Vijendran & Co

[Rayuan dari Mahkamah Tinggi, Kuala Lumpur; Guaman No: S2(S1)-23-16-96]

[Nota Pengarang: Untuk penghakiman Mahkamah Tinggi, sila lihat Vijendran Ponniah v. MBf Country Homes & Resorts Sdn Bhd & Anor [2002] 2 CLJ 157]

Dilaporkan oleh Suresh Nathan

PENGHAKIMAN

Sulaiman Daud HMR:

[1] Tetuan Bee Ling & Co, defendan kedua, telah merayu terhadap keputusan Hakim Mahkamah Tinggi yang bijaksana ("hakim bicara") yang telah membenarkan tuntutan plaintif bagi ganti rugi atas kausa tindakan pendakwaan niat-jahat sivil (civil malicious prosecution) dan penyalahgunaan proses (abuse of process). Di akhir rayuan, mahkamah ini dengan keputusan majoriti telah membenarkan rayuan defendan kedua dengan kos, dan mengetepikan keputusan hakim bicara. Alasan bagi keputusan membenarkan rayuan ini adalah seperti yang dihuraikan berikutan ini.

Latar Belakang

[2] Keterangan di hadapan mahkamah menunjukkan plaintif, seorang peguambela dan peguamcara, adalah pemegang kad kredit Carte Blanche yang dikeluarkan oleh defendan pertama. Pada sekitar bulan Mac 1987 terdapat sejumlah RM7,289.17 yang masih terhutang dan kena dibayar di bawah kad kredit itu. Keterangan juga menunjukkan firma guaman plaintif pernah menyediakan satu perjanjian pinjaman untuk defendan pertama dan telah mengemukakan bil bertarikh 4 Ogos 1986 sejumlah RM15,000 sebagai fee guaman. Disamping itu firma guaman plaintif turut mengemukakan bil sejumlah RM31,250 kepada MBf Holdings, syarikat pemegangan defendan pertama, sebagai fee bagi penyediaan satu perjanjian untuk syarikat itu. Kedua-dua bil tersebut bagaimanapun tidak dijelaskan.

[3] Melalui suratnya bertarikh 24 Mac 1987, defendan pertama telah membatalkan akaun dan kad kredit plaintif dan sehubungan dengan itu telah memintanya menjelaskan jumlah yang masih terhutang di bawah akaun itu. Ini disusuli dengan surat tuntutan peguamnya Tetuan Azim, Ong & Krishnan bertarikh 29 Mac 1988 (disebut "peguam pertama"). Plaintif melalui surat peguamnya

bertarikh 6 April 1988 telah menafikan berhutang dengan defendan pertama seperti yang dituntut, dan sebaliknya telah menuntut bayaran kedua-dua bil tersebut di atas.

[4] Perkembangan selanjutnya menunjukkan defendan pertama, melalui peguam pertamanya, telah memfailkan saman bertarikh 23 April 1988 di Mahkamah Majistret Kuala Lumpur (disebut "saman") terhadap plaintif menuntut sejumlah RM7,519.44 yang masih terhutang di bawah kemudahan kad kredit tersebut. Pada 28 Jun 1988 melalui peguam pertamanya, defendan pertama telah memasuki penghakiman ingkar terhadap plaintif atas ketidakhadiran peguamnya pada tarikh kembalian saman itu (disebut "penghakiman ingkar"). Seterusnya, pada sekitar bulan Oktober 1992 defendan pertama telah melantik firma guaman defendan kedua, iaitu perayu sekarang ini, untuk menggantikan peguam pertamanya dengan arahan untuk memulakan prosiding kebankrapan terhadap plaintif menurut penghakiman ingkar tersebut.

[5] Bertindak atas arahan itu, pada 1 Disember 1992 defendan kedua telah memfailkan suatu notis kebankrapan terhadap plaintif di Bahagian Dagang, Mahkamah Tinggi Kuala Lumpur menghendakinya menjelaskan jumlah yang masih terhutang di bawah penghakiman itu yang pada masa material telahpun meningkat ke RM16,945, berserta faedah. Plaintif, melalui suratnya bertarikh 10 Disember 1992, telah memberitahu defendan kedua bahawa dia terkejut atas percubaan defendan kedua yang hendak menyampaikan notis kebankrapan itu kepadanya dan menyatakan perkara itu telahpun diselesaikan. Dia turut mengingatkan defendan kedua tentang akibatnya jika dia tidak memberhentikan prosiding kebankrapan tersebut. Defendan kedua telah merujukkan surat itu kepada defendan pertama tetapi telah diberitahu tiada penyelesaian telah dicapai dan defendan kedua telah diarahkan untuk meneruskan dengan prosiding kebankrapan tersebut. Tarikh luput notis kebankrapan itu telah dilanjutkan dari masa ke masa disebabkan kesukaran yang dihadapi oleh defendan kedua bagi penyampaiannya. Akhirnya, notis itu telah disampaikan kepada plaintif melalui penyampaian ganti pada 28 Februari 1994. Berikutannya, peguam plaintif melalui suratnya bertarikh 3 Mac 1994 kepada defendan kedua telah mengembalikan dokumen-dokumen tersebut atas alasan ia dialamatkan kepada Ponniah Vijendran (dan tidak atas nama plaintif Vijendran Ponniah). Tiada bayaran dibuat oleh plaintif dalam masa yang ditetapkan di bawah notis itu. Seterusnya pada

23 Jun 1994 defendan kedua telah mengeluarkan suatu petisyen pemiutang terhadap plaintif lanjutan daripada notis kebankrapan tersebut.

[6] Kira-kira empat bulan kemudian pada 24 Oktober 1994, plaintif telah memohon penggantungan prosiding kebankrapan tersebut, dan pengetepian notis kebankrapan serta perintah penyampaian ganti bertarikh 31 Mac 1993 itu. Namun, pihak defendan masih meneruskan dengan prosiding kebankrapan tersebut, dan pada 16 November 1994 defendan kedua telah memperolehi perintah penyampaian ganti petisyen kebankrapan berkenaan.

[7] Dengan perkembangan ini, pada 9 January 1995 plaintif telah memfailkan permohonan bagi mengetepikan penghakiman ingkar tersebut atas dua alasan utama: pertama, dia menegaskan bahawa penghakiman itu tidak sah kerana saman yang dimaksudkan tidak pernah disampaikan kepadanya; dan kedua, dia mempunyai pembelaan bermerit. Permohonan itu telah disampaikan kepada defendan kedua pada 18 Januari 1995 tetapi sebelum tarikh penyampaian itu defendan kedua telah terlebih dahulu menyampaikan petisyen pemiutang kepada plaintif pada 11 Januari 1995. Akhirnya, pada 22 Ogos 1995, mahkamah majistret telah mengetepikan penyampaian saman tersebut dan seterusnya membatalkan penghakiman ingkar berkenaan. Seterusnya pada 24 November 1995 plaintif telah berjaya memperolehi perintah bagi mengetepikan notis kebankarapan tersebut dan perintah penyampaian ganti yang disebut terdahulu.

[8] Berdasarkan kepada fakta-fakta dan urutan peristiwa tersebut di atas, plaintif, pada 4 April 1996, telah memulakan tindakan sekarang ini bagi mendapatkan ganti rugi terhadap defendan-defendan atas dua kausa tindakan, iaitu, pertama defendan-defendan telah secara niat-jahat (malice) dan tanpa sebab munasabah telah memulakan prosiding kebankrapan terhadapnya di bawah Akta Kebankrapan 1967 ("Akta"); dan kedua, bahawa prosiding kebankrapan yang telah dibawa dan diteruskan itu adalah suatu penyalahgunaan proses mahkamah dengan niat-jahat untuk mencemarkan reputasi plaintif dan tidak atas alasan sah dan munasabah. Kausa tindakan pertama tersebut termasuk di bawah tort pendakwaan niat- jahat sivil yang telah diiktiraf sebagai suatu tort yang berasingan daripada penyalahgunaan proses walaupun kedua-duanya amat berkaitan dan menyerupai antara satu sama lain. Oleh itu, bagi maksud rayuan ini

saya mendapati lebih sesuai untuk menimbangkan kedua-duanya secara berasingan dengan berpandukan kepada prinsip undang-undang yang terpakai baginya masing-masing. Saya mulakan dengan pendakwaan niat-jahat sivil.

Pendakwaan Niat-Jahat Sivil (Civil Malicious Prosecution)

[9] Adalah suatu prinsip undang-undang yang mantap bahawa seseorang boleh mengambil tindakan bagi ganti rugi kerana kecederaan yang dialaminya disebabkan oleh permulaan suatu prosiding kebankrapan terhadapnya secara niat-jahat (maliciously) dan tanpa sebab munasabah dan mungkin (without reasonable and probable cause). Kausa tindakan ini telah mula diiktiraf di bawah undang-undang Inggeris melalui kes *Johnson v. Emerson and Sparrow* [1871] LR 6 Ex 329 dan *Quartz Hill Consolidated Gold Mining Company v. Eyre* [1883] 11 QBD 674) atas alasan bahawa plaintif telah mengalami kecederaan reputasi sebelum dia boleh menunjukkan dakwaan yang dilemparkan terhadapnya adalah tidak benar; dan walaupun dia tidak megalami apa-apa kerugian kewangan tetapi nama baiknya telah tercemar akibat tindakan terhadapnya itu (lihat saranan Brett LJ, di ms 684, dalam *Qurtz Hill, supra*).

[10] Dalam kes ulong *Johnson v. Emerson, supra*, fakta kes menunjukkan defendan telah mengeluarkan satu saman penghutang terhadap plaintif yang telah disampaikan pada 28 Mac 1870. Atas permohonan plaintif untuk mengetepikan saman itu, mahkamah telah memerintahkan plaintif melaksanakan, dalam masa tujuh hari, suatu bon dengan dua orang penjamin sementara menunggu perbicaraan hutang tersebut. Adalah diperintahkan selanjutnya bahawa semua prosiding berkaitan saman itu digantung. Setelah plaintif gagal melaksanakan bon itu, pemiutang telah memfailkan petisyen kebankrapan terhadap plaintif yang menyebabkan plaintif diisytiharkan bankrap. Defendan, seorang peguam yang bertindak bagi pihak pemiutang telah didapati bertanggungan kerana memulakan prosiding kebankrapan itu secara niat-jahat dan tanpa sebab munasabah dan mungkin atas alasan tiada perbuatan kebankrapan telah dilakukan memandangkan terdapatnya perintah penggantungan tersebut. Dalam menyampaikan keputusannya, Cleasby B berkata, di ms 344:

> I apprehend that, if three things concur, the person prosecuting the proceedings is liable to an action. First, if the proceeding be really without foundation; and this must be evidenced by proceedings have finally terminated in favour of the plaintiff, whether the proceedings be in bankruptcy or by indictment (see *Whitworth v. Hall* (2B. & Ad. 695 at p. 698), where it is said that actions for malicious prosecutions, malicious arrest, and taking bankruptcy proceedings, stand upon the same foundation). Secondly, the proceedings must have been taken without reasonable and probable cause. And thirdly, lest persons should be deterred, by fear of the consequences, from enforcing the law with dispatch upon *bona fide* suspicion, before a man can be made responsible it must be shewn that, in taking the proceeding, he was actuated by malice or by some bad motive.

[11] Dalam kes *Whitworth v. Hall* [1824-1834] All ER Rep 484, Littledale J menyarankan tiada perbezaan di antara tindakan bagi pendakwaan niat-jahat secara pertuduhan jenayah, atau tangkapan salah, dan dengan niat-jahat memulakan tindakan kebankrapan. Dalam kesemua tindakan ini adalah perlu untuk membuktikan prosiding asal yang menjadi asas kepada kausa tindakan itu telah ditamatkan. Dalam kes *Abrath v. North Eastern Rail Co* [1881-1885] All ER Rep 614, plaintif, seorang pakar bedah, telah dituduh terlibat dalam konspirasi untuk melakukan kesalahan menipu dan fraud berdasarkan maklumat yang diberikan oleh defendan. Dia telah dibebaskan atas pertuduhan itu, dan berikutannya telah memulakan tindakan pendakwaan niat-jahat terhadap defendan. Menyentuh tentang beban bukti bagi elemen-elemen dalam tort ini, Sir Baliol Brett MR berkata:

> … The points which it is necessary for the plaintiff to substantiate in order to make out his case are not in doubt. The question as to this has often been decided, and the rule is well established. It is not enough to show that the plaintiff is innocent of the charge made against him. He must show that the prosecution was instituted without reasonable and probable cause, and with a malicious intention in the mind of the defendant – not a mere intention to carry the law into effect, but a malicious intention to injure the plaintiff; the burden of proving each proposition is on the plaintif …

Dalam kes itu Bowen LJ, yang juga telah menyentuh tentang perkara yang sama telah berkata:

> The action was brought for malicious prosecution, and in such an action the plaintiff has to prove, first, that he is innocent of the charge brought against him, and has been pronounced by the tribunal before which the charge was investigated; secondly, he

must prove what is compendiously called want of reasonable and probable cause for bringing the charge against him, or in other words, he must proved circumstances which are inconsistent in the eye of the judge before whom the action is tried with the existence of reasonable cause; and thirdly, he must prove that the proceedings were initiated in a malicious spirit, that is, from an improper motive. If any step is necessary in order to prove any of these propositions, the burden of proof as to that step is on the plaintiff, because no chain is stronger that its weakest link …

[12] Apa yang dimaksudkan dengan 'malice' (niat-jahat) dan 'without reasonable and probable cause' (tanpa sebab munasabah dan mungkin) telah dijelaskan oleh Slade LJ dalam kes *Radivojevic v. LR Industries Ltd* [1984] Transcript 514, seperti berikut:

The authorities seem to show that where a bankruptcy petition has been presented maliciously and without reasonable and probable cause, an action will lie against the petitioning creditor, provided that the petition has been dismissed or the adjudication annulled. Malice in this context I take to mean improper or wrongful motive of some kind.

Want of reasonable and probable cause I take to mean want of genuine belief, based on reasonable grounds, that there was good grounds in law for presenting the bankruptcy petition at the time when it was presented, upon an alleged act of bankruptcy. I take this from the judgments in *Johnson v. Emerson and Sparrow* Vol 6 Exchequer Cases 1870-1871 329 at p 345 per Baron Cleasby at page 375 per Baron Martin and at page 391 per Chief Baron Kelly.

I would emphasise that malice and lack of reasonable and probable cause are quite separate and distant ingredients of the tort, both of which have to be proved …

Dalam kes ini mahkamah telah menolak rayuan plaintif terhadap keputusan hakim bicara yang menolak tuntutannya bagi ganti rugi terhadap defendan kerana telah dengan niat-jahat menyebabkannya menjadi seorang bankrap setelah mendapati plaintif gagal sama sekali membuktikan ketiadaan sebab munasabah dan mungkin dalam memulakan tindakan kebankrapan itu terhadapnya.

[13] Daripada keputusan-keputusan kehakiman tersebut di atas bolehlah dirumuskan bahawa terdapat banyak persamaan di antara tindakan bagi ganti rugi kerana kecederaan yang diakibatkan oleh permulaan sesuatu prosiding kebankrapan secara niat-jahat dan tanpa

sebab munasabah dengan tort pendakwaan niat-jahat yang terbit daripada pertuduhan jenayah. Dalam hal prosiding kebankrapan, terdapat empat elemen yang perlu dibuktikan: iaitu: A

(i) prosiding kebankrapan itu telah di mulakan.

(ii) prosiding itu telah ditamatkan dengan memihak kepada orang yang terhadapnya prosiding itu dimulakan; B

(iii) prosiding itu telah dimulakan tanpa sebab munasabah dan mungkin; dan

(iv) prosiding itu telah dikemukakan dengan niat-jahat. C

[14] Dalam kes sekarang ini, elemen pertama dan kedua tidak dipertikaikan. Defendan kedua, selaku peguam defendan pertama, telah mengeluarkan notis kebankrapan bertarikh 1 Disember 1992 terhadap plaintif berdasarkan penghakiman ingkar bertarikh 28 Jun 1988. Berikutannya suatu prosiding kebankrapan telah dimulakan terhadap plaintif dengan pengeluaran petisyen pemiutang bertarikh 23 Jun 1994. Kedua-dua notis kebankrapan dan petisyen pemiutang tersebut telah ditamatkan dengan memihak kepada plaintif berikutan pengetepiannya oleh mahkamah pada 16 November 1995 setelah penghakiman ingkar yang menjadi asas pengemukaannya di ketepikan sebelumnya pada 22 Ogos 1995. D E

[15] Beralih kepada elemen ketiga. Mengenai isu ini, hakim bicara telah memutuskan bahawa plaintif telah berjaya atas imbangan kebarangkalian membuktikan bahawa prosiding kebankrapan yang dimaksudkan telah dimulakan oleh defendan kedua terhadap plaintif tanpa sebab munasabah dan mungkin. Alasan-alasan bagi keputusannya itu bolehlah dirumuskan seperti berikut: pertama, beliau mendapati prosiding kebankrapan itu penuh dengan ketidakteraturan-ketidakteraturan tak boleh diperbaiki (incurable irregularities) kerana telah berasaskan kepada suatu penghakiman ingkar yang tidak sah. Kedua, beliau mendapati penyampaian notis kebankarapan itu melalui penyampaian ganti juga tidak teratur kerana telah dilakukan hanya setelah tempoh perlanjutan notis kebankrapan itu tamat. Ketiga, perlanjutan tempoh notis kebankrapan itu juga tidak sah kerana afidavit sokongan yang diikrarkan mengandungi pernyataan-pernyataan yang mengelirukan, dan defendan kedua juga bersalah kerana cuba menyembunyikan ketidakteraturan-ketidakteraturan ini kepada mahkamah semasa F G H I

memulakan prosiding kebankrapan tersebut. Atas alasan-alasan tersebut di atas, beliau memutuskan plaintif tidak melakukan perbuatan kebankrapan di bawah Akta, dan dengan yang demikian petisyen pemiutang yang dimaksudkan itu telah dikeluarkan tanpa sebab munasabah dan mungkin dan berlawanan dengan Akta. Selanjutnya dia mendapati defendan kedua, walaupun bertindak atas arahan, mempunyai kewajipan untuk menentukan keesahan penghakiman ingkar dan penyampaian notis kebankrapan tersebut sebelum bertindak mengeluarkan petisyen pemiutang yang dimaksudkan. Menurutnya lagi defendan kedua dalam berbuat demikian sepatutnya lebih berhati-hati memandangkan penghakiman ingkar bukanlah suatu penghakiman muktamad.

[16] En Porres Royan, bagi pihak defendan kedua, menegaskan pada kesemua masa material adalah diakui dan tidak dipertikaikan bahawa terdapat hutang yang kena dibayar oleh plaintif kepada defendan pertama, dan bahawa suatu penghakiman ingkar telah diperolehi bagi hutang tersebut. Dengan yang demikian, beliau menghujahkan defendan kedua, sebagai peguam yang hanya dilantik untuk memulakan prosiding kebankrapan tersebut mempunyai sebab munasabah dan mungkin untuk memulakan prosiding kebankrapan tersebut terhadap plaintif bagi mendapatkan semula jumlah yang terhutang dan kena dibayar di bawah penghakiman tersebut. Beliau menambah, pada tarikh pengeluaran notis kebankrapan dan petisyen pemiutang itu masing-masingnya tiada permohonan difailkan bagi mengetepikan penghakiman ingkar itu. Keterangan yang diberikan oleh plaintif semasa perbicaraan juga jelas menunjukkan dia mengetahui tentang prosiding di mahkamah majistret terhadapnya sebelum tarikh kembalian saman itu pada 28 Jun 1988. Seterusnya peguam terpelajar itu menegaskan adalah juga ternyata daripada surat peguamnya bertarikh 3 April 1994, plaintif menyedari tentang usaha untuk menyampaikan notis kebankrapan itu kepadanya tetapi dia telah mengarahkan peguamnya untuk mengembalikan dokumen tersebut.

[17] En Malek Imtiaz, bagi pihak plaintif, menegaskan bahawa defendan kedua telah diberitahu oleh plaintif melalui suratnya bertarikh 10 Disember 1992 supaya tidak meneruskan prosiding kebankrapan yang hendak dimulakannya itu. Menurutnya plaintif dalam surat itu telah memberitahu defendan kedua bahawa dia telah mengalami kecederaan yang tidak dapat dipulihkan akibat pengeluaran notis kebankrapan itu, dan telah mengingatkan

defendan kedua untuk menghadapi segala kemungkinan jika dia gagal memberhentikan prosiding kebankrapan tersebut dengan serta-merta, dan bersetuju dengan permohonannya untuk mengetepikan penghakiman ingkar yang dimaksudkan. Menurutnya dengan peringatan itu, defendan kedua sepatutnya mengetahui bahawa dia sebenarnya tidak mempunyai apa-apa asas untuk memulakan apa-apa prosiding kebankrapan terhadap plaintif. Namun demikian, dia menegaskan defendan kedua tidak memberikan apa-apa reaksi terhadap surat tersebut tetapi tetap meneruskan prosiding kebankrapan itu dengan mengeluarkan petisyen pemiutang yang dipersoalkan.

[18] Peguam terpelajar itu turut menarik perhatian mahkamah bahawa pada 24 Oktober 1994, plaintif juga telah memfailkan dan menyampaikan kepada defendan kedua permohonannya untuk mengetepikan notis kebankrapan tersebut di mana afidavit sokongannya dengan jelas menunjukkan bahawa saman yang menjadi asas penghakiman ingkar tersebut tidak pernah disampaikan kepadanya, dan dengan yang demikian menurutnya defendan kedua sepatutnya tahu bahawa penghakiman itu adalah tidak sah dan tidak boleh dijadikan asas bagi prosiding kebankrapan yang dimulakannya itu. Tambah beliau, afidavit sokongan plaintif juga jelas menunjukkan ketidakpatuhan-ketidakpatuhan tak boleh diperbaiki dalam prosiding kebankrapan yang telah dimulakan terhadapnya. Atas alasan ini, beliau menghujahkan defendan kedua sepatutnya tahu bahawa tiada sebab munasabah dan mungkin baginya untuk meneruskan prosiding kebankrapan tersebut.

[19] Bagi memuaskan elemen ketiga ini, plaintif hendaklah membuktikan ketika pengeluaran notis kebankrapan itu pada 1 Disember 1992 dan pengeluaran petisyen pemiutang pada 23 Jun 1994, defendan kedua sebenarnya tidak mempercayai, atas alasan yang munasabah, terdapatnya alasan yang baik di sisi undang-undang bagi pengemukaan notis dan petisyen itu (menurut Slade LJ dalam kes *Radivojevic, supra*). Isu sama ada terdapat sebab munasabah dan mungkin adalah suatu soal fakta dan bukan soal undang-undang: lihat *Halsbury's Law of England* (4th edn, vol 45.2) di para 471. Dalam menimbangkan rayuan yang berkaitan dengan suatu dapatan fakta, saya peka dengan prinsip undang-undang bahawa mahkamah rayuan pada lazimnya tidak akan campur tangan melainkan ternyata bahawa mahkamah perbicaraan itu telah tersilap atau tersalah arah dalam membuat keputusannya.

[20] Berbalik kepada rayuan ini. Setelah meneliti alasan penghakiman hakim bicara mengenai isu ini, saya mendapati beliau ternyata tersilap dalam mencapai keputusan yang dibuatnya. Jika diperhatikan beliau terlalu memberi penekanan kepada ketidakteraturan-ketidakteraturan yang berlaku dalam pemerolehan penghakiman ingkar dan prosiding kebankrapan tersebut, yang masing-masing berkisar kepada penyampaian saman dan notis kebankrapan yang dimaksudkan dan tidak kepada kepercayaan defendan kedua tentang ketiadaan sebab munasabah dan mungkin untuk memulakan prosiding kebankrapan itu.

[21] Fakta kes ini jelas menunjukkan bahawa penghakiman ingkar tersebut telah diperolehi oleh peguam pertama defendan defendan pertama, dan dari masa penghakiman itu diperolehi pada tahun 1988 hingga ke tarikh pengeluaran notis kebankrapan dan petisyen pemiutang pada 1 Disember 1992 dan 23 Jun 1994 masing-masingnya, penghakiman itu masih berkuatkuasa. Permohonan bagi pengetepiannya hanya difailkan pada 9 Januari 1995 dan telah dibenarkan pada 22 Ogos 1995 atas alasan ia telah diperolehi tanpa penyerahan saman yang berkenaan kepada plaintif.

[22] Penghakiman ingkar itu, setakat yang relevan, dibacakan seperti berikut:

> The 28th Day Of June 1988 In Open Court
>
> Judgment
>
> THE ACTION having this day been called on for mention before His Honour Mr Tan Kim Siong, Magistrate, Magistrate's Court, Kuala Lumpur in the presence of Tunku Farik Ismail of Counsel for the Plaintiff and the Defendant not appearing though duly served with the summons and Statement of Claim herein;
>
> BY DEFAULT IT IS THIS DAY ADJUDGED that the Defendant do pay the plaintiff the sum of ringgit Seven Thousand Five Hundred and Nineteen and Cents Fourty Four (M$ 7,519.44) together with service charges at the rate of 1.5% per mensem and interest at the rate of 8% per annum from 28th day of March 1988 to the date of realization AND IT IS ALSO ADJUDGED that the defendant do pay the Plaintif the sum of ringgit Two Hundred And Seventy Seven (M$ 277.00) costs.
>
> Dated the 28th day of June 1988.

A

…
Magistrate
Magistrate's Court
Kuala Lumpur.

B

[23] Jika diperhatikan penghakiman tersebut di atas dengan jelas mengandungi pernyataan tentang penyampaian saman dan pernyataan tuntutan yang dimaksudkan dalam perintah tersebut kepada plaintif. Walaupun SD2 dalam keterangannya menyatakan dia tidak menemui apa-apa bukti tentang penyampaian saman itu, tetapi sebagaimana yang dinyatakan oleh peguam terpelajar defendan kedua pada hakikatnya memang terdapat satu afidavit penyampaian yang diikrarkan oleh kerani peguam pertama yang menyatakan pada 23 Mei 1988 dia telah menyebabkan disampaikan kepada alamat plaintif yang terakhir diketahui melalui sampul berdaftar saman dan pernyataan tuntutan yang dimaksudkan (di ms 444 rekod rayuan). Berdasarkan kepada fakta-fakta tersebut di atas, pada hemat saya tiada sebab yang munasabah bagi defendan kedua untuk mengesyaki, pada ketika pengeluaran notis kebankrapan dan petisyen pemiutang tersebut, bahawa penghakiman ingkar itu telah diperolehi secara tidak sah atas alasan yang ia akhirnya diketepikan.

C

D

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[24] Perlu ditekankan semula bahawa dalam kes sekarang ini asas tindakan plaintif adalah kecederaan kepada reputasinya yang disebabkan oleh pengeluaran notis kebankrapan dan pengemukaan petisyen pemiutang tanpa sebab munasabah dan mungkin; oleh itu pada hemat saya tarikh material bagi menentukan sama ada terdapat sebab munasabah dan mungkin untuk berbuat demikan adalah tarikh notis atau petisyen itu dikemukakan kerana pada lazimnya tindakan mengiklankan notis dan petisyen tersebut, yang dilakukan pada permulaan prosiding itu, yang menyebabkan pencemaran nama baik seseorang itu. Di sini saya mendapati hakim bicara sekali lagi tersilap apabila terlalu memberi tumpuan kepada pengetepian penghakiman ingkar tersebut yang tenyata telah berlaku hanya selepas pemfailan petisyen tersebut. Begitu juga, pada pendapat saya, ketidakteraturan-ketidakteraturan dalam penerusan prosiding kebankrapan itu hanya berkaitan dengan keesahan prosiding itu sendiri, dan tidak dalam menentukan sama ada terdapat sebab munasabah dan mungkin bagi memulakannya, iaitu isu pokok dalam menentukan tindakan sedemikian.

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[25] Dalam kes sekarang ini pada pendapat saya, pihak plaintif telah gagal sama sekali untuk membuktikan pada masa notis kebankrapan dan petisyen pemiutang tersebut dikemukakan, defendan kedua sebenarnya tidak mempercayai, atas alasan yang munasabah, terdapatnya alasan yang baik di sisi undang-undang baginya memulakan prosiding kebankrapan tersebut. Dia bertindak atas suatu penghakiman, walaupun penghakiman ingkar, yang ketika itu masih sah dan tidak dicabar yang telah dikeluarkan empat tahun sebelumnya. Begitu juga surat plaintif bertarikh 10 Disember 1992 hanya menyatakan 'this is a 1988 matter which was laid to rest'. Pada masa surat itu ditulis plaintif telahpun mengetahui mengenai usaha defendan kedua hendak menyampaikan notis kebankrapan itu kepadanya tetapi tiada apa-apa dalam surat tersebut yang menunjukkan dia mempertikaikan jumlah yang terhutang di bawah penghakiman ingkar tersebut. Malahan, permohonan bagi mengetepikan penghakiman itu hanya disampaikan kepada defendan kedua kira-kira enam bulan selepas petisyen pemiutang difailkan. Begitu juga tiada keterangan yang menunjukkan bahawa defendan kedua mengetahui tentang tuntutan plaintif di bawah bil-bil yang dikatakan semasa prosiding kebankrapan itu dimulakan.

[26] Hakim bicara turut mendapati, dengan bersandarkan kepada kes *Re: Udos; Ex Parte: Seabanc Kredit Sdn Bhd* [1994] 3 CLJ 377, bahawa penghakiman ingkar dalam kes sekarang ini masih belum matang sebagai penghakiman muktamad, dan dengan yang demikian tiada prosiding kebankrapan boleh dimulakan terhadap plaintif. Dalam hal ini saya hanya perlu merujuk kepada kes *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343, di mana Mahkamah Agong telah memutuskan sesuatu penghakiman ingkar sehingga diketepikan adalah suatu penghakiman sah dan boleh dikuatkuasakan. Prinsip yang sama telah diikuti dalam kes *Vijendran Ponniah v. Bank of Commerce* [1999] 5 CLJ 69, di mana telah diputuskan bahawa sesuatu penghakiman ingkar adalah suatu penghakiman yang baik sehingga diketepikan; dan apabila jumlah di bawah sesuatu penghakiman itu tidak dibayar, maka ia boleh dikuatkuasakan, termasuk dalam bentuk prosiding kebankrapan.

[27] Kesimpulannya, atas alasan-alasan tersebut di atas, saya mendapati hakim bicara telah tersilap dan tersalah arah apabila memutuskan plaintif telah berjaya membuktikan elemen ketiga ini.

Niat-jahat (Malice)

[28] Elemen keempat yang perlu dibuktikan ialah bahawa defendan kedua telah memulakan prosiding kebankrapan itu dengan niat-jahat. Sebagaimana yang telah nyatakan dalam kes *Radivojevic, supra*, niat-jahat dalam konteks ini bermaksud didorong oleh motif yang tak sepatutnya atau salah. Niat-jahat dan ketiadaan sebab munasabah dan mungkin adalah dua elemen yang berlainan bagi tort ini, kedua-duanya hendaklah dibuktikan. Prinsip undang-undang ini telah dijelaskan dengan lebih lanjut dalam kes *Partizan Ltd v. Of Kilkenny & Co Ltd* [1998] 1 BCLC 157, di mana fakta kes menunjukkan defendan telah mengemukakan suatu petisyen penggulungan terhadap syarikat plaintif berdasarkan hutang yang masih belum dijelaskan. Petisyen itu telah ditolak dengan alasan bahawa hutang tersebut dipertikaikan dan defendan tidak boleh bergantung kepada hutang itu bagi memfailkan petisyen berkenaan. Berikutannya, plaintif telah memohon bagi mendapatkan ganti rugi yang disebabkan oleh pengemukaan petisyen tersebut secara niat-jahat. Rimer J mendapati plaintif telah gagal membuktikan ketiadaan sebab yang munasabah dan mungkin bagi defendan mengemukakan petisyen itu, iaitu satu daripada elemen yang perlu dibuktikan bagi kausa tindakannya. Seterusnya beliau menyatakan:

> That being so, it follows that Partizan's claim fails, but I should also comment on two other matters. The first is whether it has established the third element, namely malice. Proof of the second elemen may enable an inference of malice to be drawn but it does not follow inevitably from such proof that the petitioner was motivated by malice. As Slade LJ pointed out in the LR Industries case, above, malice is a separate and distinct ingredient. In this context, it means the presentation of a petition with some improper or wrongful motive of some kind.

[29] Begitu juga dalam kes *Jacob v. Vockrodt* [2007] EWHC 2403 (QB), mahkamah telah mendapati tiada keperluan untuk meneruskan dengan isu niat-jahat setelah memutuskan bahawa semasa petisyen kebankrapan yang dimaksudkan itu dikemukakan tidak terdapat ketiadaan kepercayaan yang munasabah dan mungkin bagi pengemukaannya. Hakikat ini telah dijelaskan oleh hakim bicara Peter Coulson seperti berikut:

> In the light of my conclusion, that for two separate reasons there was no absence of reasonable and probable belief when the petition was presented …, it is strictly unnecessary for me to deal with this issue …

[30] Saya bersetuju dengan apa yang disarankan dalam kedua-dua kes tersebut di atas. Untuk berjaya dalam kausa tindakan sedemikan, pihak plaintif hendaklah membuktikan kedua-dua elemen ini, iaitu ketiadaan sebab munasabah dan mungkin bagi memulakan prosiding itu, dan niat-jahat dalam pengemukaannya. Setelah memutuskan bahawa plaintif telah gagal membuktikan elemen yang mula-mula disebut itu, maka tiada keperluan bagi saya untuk meneruskan dengan isu niat-jahat. Namun demikian, setelah meneliti keseluruhan keterangan yang telah dikemukakan, khususnya keterangan defendan kedua sendiri dan surat-menyurat yang berkaitan dengannya, saya berpuas hati bahawa tindakan defendan kedua dalam memulakan prosiding kebankrapan ini terhadap plaintif tidak bermotifkan niat-jahat.

[31] Dia tidak terlibat dalam pemerolehan penghakiman ingkar tersebut yang ternyata tidak menunjukkan apa-apa kecacatan dari segi bentuknya. Kandungannya juga menunjukkan penyerahan saman itu kepada plaintif. Perlu ditekankan semula, semasa defendan kedua dilantik oleh defendan pertama, penghakiman itu masih tidak dicabar walaupun lebih daripada tiga tahun telah berlalu. Begitu juga dalam surat-menyurat di antara defendan kedua dan plaintif tiada apa-apa yang menunjukkan atau yang boleh disiratkan sebagai menunjukkan hutang penghakiman itu dipertikaikan. Dengan yang demikian ternyata kepada saya defendan kedua dalam memulakan prosiding kebankrapan tersebut tidak mempunyai apa-apa motif jahat tetapi hanya bertujuan untuk mendapatkan semula hutang di bawah penghakiman ingkar tersebut. Saya juga mendapati jika pun terdapat apa-apa ketidakteraturan dalam pengendalian prosiding kebankrapan tersebut oleh defendan kedua tetapi ia tidaklah mencukupi untuk menerbitkan apa-apa inferens niat-jahat terhadapnya.

[32] Dalam memutuskan terdapatnya elemen niat-jahat sedemikian, hakim bicara telah merujuk kepada carian dalam fail mahkamah yang menunjukkan ketiadaan afidavit penyampaian saman yang dimaksudkan. Berdasarkan fakta ini, beliau telah merumuskan bahawa sikap defendan kedua yang tidak berhati-hati (lack of care) adalah mencukupi untuk menunjukkan suatu niat-jahat dipihaknya. Pada pendapat saya elemen tidak atau kurang berhati-hati ini lebih relevan dengan tort kecuaian. Walaupun ia merupakan satu faktor yang boleh diambil kira dalam menentukan sama ada terdapatnya sebab munasabah dan mungkin bagi memulakan sesuatu tindakan tetapi tidaklah hingga boleh menimbulkan suatu anggapan niat-

jahat dalam konteks tort pendakwaan niat-jahat. Walau apa pun, pada hemat saya, adalah mencukupi bagi defendan kedua untuk hanya berpandukan kepada dokumen-dokumen yang dikemukakan kepadanya dan yang telah diperolehi daripada peguam pertama dalam menimbangkan langkah-langkah yang hendak diambilnya, termasuk memulakan prosiding kebankrapan, bagi tujuan mendapatkan hutang penghakiman yang dimaksudkan daripada plaintif. Oleh itu ternyata kepada saya hakim bicara telah tersilap apabila membuat keputusan dengan memberi pertimbangan kepada fakta-fakta yang tidak relevan.

Penyalahgunaan Proses

[33] Kausa tindakan ini telah diplidkan dalam perenggan 13 pernyataan tuntutan di mana plaintif telah menegaskan bahawa prosiding kebankrapan yang dibawa terhadapnya adalah suatu penyalahgunaan proses, *mala fide* dan niat-jahat bagi mencemarkan reputasinya sebagai seorang peguambela dan peguamcara.

[34] Mahkamah Inggeris dalam kes *Grainer v. Hill* 132 ER 769, telah membezakan tort penyalahgunaan proses dengan tort pendakwaan niat-jahat. Berkenaan dengan tort ini, dalam kes *Goldsmith v. Sperrings Ltd* [1977] 2 All ER 566, Lord Denning MR (penghakiman menentang) berkata, di ms 574:

> What make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to law. This appears distinctly from the case which founded this tort. It is *Grainger v. Hill* [1838] 4 Bing. (NC) 212; which arose out of the old process of capias.

Dalam kes yang sama Lord Denning dan Lord Bridge, kedua-duanya, telah merujuk kepada saranan Lord Evershed MR dalam *In re Majory* [1955] Ch. 600, di ms 623:

> … This so-called rule in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose obtaining for the person so suing or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; …

[35] Keputusan mahkamah ini dalam *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin b. Ungku Mohamed* [1998] 2 CLJ 340, telah mengesahkan tort penyalahgunaan proses mahkamah

di negara ini. Dalam kes itu, Gopal Sri Ram HMR (beliau pada masa itu) telah menggariskan elemen-elemen bagi tindakan sedemikian dengan berkata, di ms 355:

> In my judgment the essential elements of the tort of the abuse of process are these:
>
> (1) The process complained of must have been initiated;
>
> (2) The purpose for initiating that process must be for some purpose other than to obtain a genuine redress which the process offers. In other words, the dorminant purpose for which the process was invoked must be collateral, that is to say, aimed at producing result not intended by the invocation of the process;
>
> (3) The plaintiff must have suffered some damage or injury in consequence.

Dalam kes itu perayu telah memperolehi penghakiman ingkar melebih RM1 juta. Berdasarkan penghakiman itu, ia telah memulakan prosiding kebankrapan dan berjaya memperolehi perintah penerimaan dan adjudikasi terhadap responden. Responden telah berjaya mengetepikan perintah-perintah tersebut disamping memperolehi perintah ganti rugi melebihi RM2 juta terhadap perayu. Pesuruhjaya Kehakiman telah menolak rayuan perayu untuk mengetepikan perintah tersebut tetapi rayuannya telah dibenarkan oleh mahkamah rayuan atas alasan bahawa tindakan responden terhadap perayu adalah berasaskan penyalahgunaan proses tetapi responden telah gagal membuktikan elemen-elemen yang tersebut di atas.

[36] Dalam kes sekarang ini elemen pertama dan ketiga tersebut di atas telahpun terbukti. Prosiding kebankrapan telahpun dimulakan dan tindakan memulakan prosiding kebankrapan itu dengan sendirinya telah mengakibatkan kecederaan kepada reputasi plaintif (lihat *Quartz v. Hill, supra*). Hanya tinggal elemen kedua yang perlu dibuktikan. Dalam konteks kes sekarang ini, untuk berjaya, plaintif hendaklah membuktikan bahawa tujuan defendan kedua memulakan prosiding kebankrapan ini terhadapnya bukanlah untuk tujuan mendapatkan balik hutang defendan pertama tetapi dengan niat tersembunyi atau untuk faedah kolateral, iaitu untuk mencemarkan reputasinya sebagai seorang peguambela dan peguamcara.

[37] Hakim bicara mendapati plaintif telah berjaya melepasi beban bukti ini atas imbangan kebarangkalian. Pertama, beliau berpuas hati bahawa plaintif telah berjaya menunjukkan tiadanya sebab munasabah dan mungkin bagi defendan kedua memulakan prosiding kebankrapan ini terhadapnya, dan dengan yang demikian, menurut hakim bicara, bolehlah dianggapkan bahawa prosiding kebankrapan itu telah dimulakan untuk tujuan yang lain daripada tujuan sebenar prosiding itu dimulakan. Keduanya, beliau mendapati defendan-defendan telah memulakan prosiding kebankrapan ini bagi mendapatkan jumlah yang hanya setengah daripada jumlah yang terhutang oleh defendan pertama kepada plaintif, dan atas alasan itu beliau merumuskan bahawa prosiding itu tidak mempunyai apa-apa tujuan komersil yang sepatutnya.

[38] Berkenaan dengan alasan pertama tersebut di atas, saya hanya perlu menyatakan sebelum ini saya telahpun memutuskan pihak plaintif telah gagal membuktikan bahawa defendan kedua sebenarnya tidak mempercayai terdapatnya sebab munasabah dan mungkin bagi memulakan prosiding kebankrapan tersebut, dan oleh itu pada hemat saya tiada keperluan untuk menimbangkan alasan pertama tersebut. Walau apa pun, saya bersetuju dengan peguam terpelajar perayu bahawa hakim bicara telah tersalah arah apabila membuat anggapan tentang tujuan kolateral prosiding kebankrapan tersebut hanya dengan berasaskan kepada ketiadaan sebab munasabah dan mungkin bagi memulakan prosiding tersebut. Saya tidak menafikan bahawa fakta itu adalah relevan untuk dipertimbangkan dalam menentukan sama ada sesuatu prosiding itu telah dimulakan untuk tujuan yang lain daripada yang dihasratkan tetapi tidaklah sebegitu hingga boleh menimbulkan anggapan mengenai elemen penting dalam tort ini. Ketiadaan sebab munasabah dan mungkin adalah salah satu elemen dalam tort pendawaan niat-jahat dan oleh itu , pada pendapat saya, adalah suatu analogi yang salah untuk mengkaitkannya dengan tort penyalahgunaan proses.

[39] Berkenaan dengan alasan kedua, saya bersetuju dengan saranan James Foong J (beliau pada masa itu) dalam kes *Vijendran Ponniah v. Bank of Commerce* [1999] 5 CLJ 69, seperti berikut, di ms 82:

> … In any event, a judgment stands as good judgment until set aside, When a judgment sum is not paid then execution can be enforced. This can take the form of a bankruptcy proceeding, as is the case here. I see no sinister approach adopted by the defendant.

[40] Dalam kes itu plaintif (yang juga plaintif dalam kes sekarang ini) menuntut ganti rugi terhadap defendan, atas tort pendakwaan niat-jahat dan penyalahgunaan proses, kerana tindakan defendan memulakan prosiding kebankrapan terhadapnya berdasarkan suatu penghakiman ingkar. Perbezaannya, tidak seperti dalam kes sekarang ini, dalam kes itu penghakiman ingkar tersebut telah gagal diketepikannya. Walau apa pun pada pendapat saya fakta sama ada penghakiman ingkar itu telah berjaya diketepikan atau tidak adalah tidak material, kerana ukurannya ialah status penghakiman itu pada masa prosiding kebankrapan itu dimulakan. Sebagaimana yang telah dinyatakan terdahulu, kecederaan pada reputasi plaintiff berlaku pada permulaan prosiding itu melalui pengiklanannya di akhbar dan di papan notis mahkamah. Dengan yang demikian, pada pendapat saya, jika sesuatu prosiding kebankrapan itu dimulakan semasa penghakiman itu masih berkuatkuasa, tiada apa-apa penyalahgunaan proses telah dilakukan kecuali telah dibuktikan bahawa defendan mempunyai niat yang tersembunyi, atau prosiding itu dimulakan untuk tujuan kolateral bagi manfaatnya.

[41] Dalam kes sekarang ini, selain daripada sekali lagi membangkitkan ketidakteraturan-ketidakteraturan yang telah dilakukan oleh defendan kedua dalam melaksanakan prosiding kebankrapan tersebut, tiada apa-apa keterangan dikemukakan oleh plaintif bagi menunjukkan bahawa tujuan defendan kedua memulakan prosiding itu terhadapnya bagi pihak defendan pertama adalah untuk tujuan mencederakan atau mencemarkan reputasi plaintif sebagai seorang peguambela dan peguamcara, atau untuk apa-apa tujuan kolateral bagi faedahnya. Perlu ditekankan semula defendan kedua hanya bertindak sebagai peguam dan tiada keterangan yang menunjukkan dia mempunyai apa-apa urusan lain dengan plaintif selain daripada prosiding kebankrapan ini. Daripada apa yang diperkatakan di atas, saya mendapati keputusan hakim bicara yang mendapati defendan kedua bertanggungan kerana penyalahgunaan proses mahkamah juga tidak disokong oleh keterangan yang ada.

[42] Kesimpulannya, atas alasan-alasan yang dihuraikan di atas, saya mendapati hakim bicara yang bijaksana telah tersalah arah dan tersilap di sisi fakta dan undang-undang apabila mendapati defendan kedua bertanggungan kerana pendakwaan niat-jahat dan penyalahgunaan proses dalam memulakan tindakan kebankrapan yang dipersoalkan terhadap plaintif. Lantaran itu, rayuan ini telah

dibenarkan dengan kos di mahkakmah ini dan mahkamah bawah. Perintah hakim bicara yang bijaksana diketepikan, dan deposit dikembalikan kepada perayu.

[43] Rakan saya yang bijaksana Heliliah Mohd. Yusof HMP telah melihat deraf penghakiman ini dan telah menyatakan persetujuan beliau dengannya.

T Selventhiranathan JCA (dissenting):

[44] The respondent, Vijendran Ponniah, was the plaintiff in the proceedings in the High Court, out of which this appeal arose, while the appellant, Tetuan Bee Ling & Co, was the second defendant in those proceedings. The first defendant in those proceedings, MBf Country Homes & Resorts Sdn Bhd, which was also found liable in the High Court, withdrew its appeal before the Court of Appeal, leaving the appeal of the second defendant for determination. For convenience, the parties will be referred to by the nomenclature used to describe them in the proceedings in the High Court.

[45] The facts of the case as related by the learned trial judge in the High Court are as follows:

> The plaintiff is an advocate and solicitor and was at all material times the sole proprietor of his legal firm. The plaintiff's firm prepared a facilities agreement for the first defendant for which a bill dated 4th August 1986 for the sum of RM15,000.00 was delivered to the first defendant. The plaintiff's firm also prepared a loan agreement for the first defendant's holding company MBf Holdings for which a bill for RM31,250.00 was delivered to MBf Holdings. The two bills were not denied and/or disputed; neither did the first defendant or MBf Holdings pay the plaintiff on his said bills.
>
> The plaintiff was a holder of a credit card from the first defendant and as at 29th March 1988 there was a sum of RM7,519.44 due on the credit card. To the first defendant's previous solicitors' notice of demand dated 29th March 1988 claiming the sums of RM7,519.44 the plaintiff by his letter dated 6th April 1988 referred to his said unpaid bills and denied owing the first defendant the sum of RM7,519.44. The plaintiff further demanded payment on his bills which far exceeded the sum of RM7,519.44. The first defendant again did not dispute the plaintiff's claim or reply to the plaintiff's letter. The plaintiff, at the request of the first defendant's

previous solicitors, again forwarded the bill with a letter dated 26 May 1988. There was no reply to this letter too. The first defendant, however, without serving the Kuala Lumpur Magistrate's Court Summons No: 82-4065-88 (the summons) on the plaintiff, proceeded to obtain judgment in default of appearance for the sum of RM7,519.44. Although the fact that the plaintiff was represented by solicitors was known to the first defendant's previous solicitors, no notice was given to the plaintiff under rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978. The summons was issued on 23rd April 1988 and judgment in default of appearance (the default judgment) was obtained on 28th June 1988.

Having obtained the default judgment the first defendant withheld execution proceedings for about four and a half years until it commenced bankruptcy proceedings against the plaintiff on 1st December 1992. No explanation was offered for withholding execution proceedings. The second defendant, the solicitors for the first defendant, received instructions from the first defendant along with a copy of the judgment, all other relevant documents, demand letters and cause papers, to institute bankruptcy proceedings against the plaintiff. The defendants continued with bankruptcy proceedings up to the point of publishing the issuance of the creditor's petition, in The Star newspaper.

On reading the advertisement of the creditor's petition in the local newspaper, the plaintiff applied to set aside the service of the summons. On a preliminary issue that the summons was never served on the plaintiff, the learned Magistrate set aside the service of the summons on 22nd August 1995. Consequently, the judgment in default was also set aside. The first defendant did not appeal against the decision of the learned Magistrate. Neither did the first defendant commence a fresh action against the plaintiff. It must be noted that the creditor's petition was also posted on the notice board of the High Court at Kuala Lumpur. The plaintiff successfully set aside the service of the bankruptcy notice and had the creditor's petition struck out on 16th November 1995.

[46] The plaintiff then instituted an action for defamation against the defendants *vide* civil suit No: S2(S1)-23-16-1996 in the High Court in Malaya at Kuala Lumpur whereby he claimed for damages against the defendants for civil malicious prosecution arising out of the bankruptcy proceedings, and for abuse of process of court.

[47] After a trial of the action, the learned trial judge, in my view correctly, set out the applicable law and made findings of facts as follows:

The facts of the case before me reveal that the judgment in default against the plaintiff was obtained without service of the summons on the plaintiff because, on a preliminary issue raised that the summons was never served on the plaintiff, the Magistrate's Court set aside the service of the summons and consequently the judgment in default was also set aside. Since the first defendant neither appealed against that decision nor elected to file a fresh action as it was entitled to do since the case was only disposed of, on a preliminary issue, there was no judgment to form the linchpin for the bankruptcy proceedings.

(a) The bankruptcy proceedings

The entire bankruptcy proceedings were riddled with incurable irregularities:

(i) The judgment upon which bankruptcy proceedings were instituted was a nullity.

(ii) The Request for Issue of Bankruptcy Notice stated that the plaintiff resided at his office, which was purportedly his last known address. The contractual address for service or the last known address of the plaintiff was his home address, namely, 97 Jalan Lee Woon, Zoo View, Ulu Klang 68000 Selangor and not the plaintiff's office which is in Kuala Lumpur.

(iii) The bankruptcy notice which was extended for 9 months from 28th February 1993, expired on 30th November 1993. This bankruptcy notice was never served whether by personal service or by substituted service within this period, resulting in the demise of the bankruptcy notice and the order for substituted service. This fact was not revealed to the Court.

(iv) The defendants applied ex parte on 24th December 1993 to extend the life of the 'dead' bankruptcy notice and obtained the order dated 28th December 1993 purportedly for 9 months. No order was made for the substituted service of the purported extended bankruptcy notice. Again these facts were not revealed to the Court.

(v) The defendants purportedly enforced a non-existent order for substituted service of a non-existent bankruptcy notice on the plaintiff on 28th February 1994. This fact too was not revealed to the Court.

A (vi) The orders for extension of the bankruptcy notice dated 31st March 1993 and 28th December 1993 respectively, and the order for substituted service of the bankruptcy notice were obtained by misleading the Court in that the affidavits filed in support of the applications contained misleading averments.

B (vii) The affidavit of non-service affirmed alleged that all reasonable efforts were made to serve the bankruptcy notice whereas in fact no letter of appointment was sent to the plaintiff to enable the plaintiff to make himself available so that service could be effected.

C (viii) The affidavit in support of the application for substituted service of the bankruptcy notice affirmed alleged that the plaintiff was evading service of the bankruptcy notice when in fact his solicitors had written a letter dated 10th December 1992 to the second defendant.

D (ix) The bankruptcy notice was never served on the plaintiff. In fact the defendants never had a bankruptcy notice to serve the plaintiff.

E (x) There was no act of bankruptcy committed by the plaintiff.

(xi) The defendants, without a bankruptcy notice and without an act of bankruptcy issued out the creditor's petition in contravention of the Bankruptcy Act 1967.

F (xii) The defendants misled the Court into granting the order for substituted service of the creditor's petition, in that:

(a) the calls were not made at the plaintiff's address of service, namely, the plaintiff's residence;

G (b) the letter of appointment purportedly sent to the plaintiff was not sent to his last known address, namely, the plaintiff's residence;

(c) the plaintiff did not receive the purported letter of H appointment;

(d) the letter of appointment purportedly sent to the plaintiff came from the agent Sejana Services Sdn Bhd and not from the second defendant; and

I (e) no enquires were made by the process-server with regard to the plaintiff.

…

(b) Can the defendants claim they were acting on a valid judgment?

The defence of both the defendants and their evidence in Court was that they were not without reasonable and probable cause to institute bankruptcy proceedings on the sole ground that they had a valid judgment at the material time of filing the said bankruptcy proceedings. The second defendant's additional defence was that it acted on the instructions of the first defendant.

…

I have enumerated all the various misgivings and mistakes committed by the defendants with respect to the obtaining of the judgment based on which the defendants commenced the bankruptcy proceedings. I cannot accept that under our law which ensures that no wrong can exist without a remedy, a litigant such as the plaintiff can be denied redress in the face of so blatant a wrong, on the ostensible ground that the defendants who had so flagrantly abused the process of the Court by improperly obtaining a judgment could attempt to benefit from such iniquitous conduct on the sole basis that they were acting upon such an order of the Court obtained improperly, which certainly no Magistrate or Judge would have granted, if appraised of the true circumstances. As for the second defendant whose additional ground was that they acted on instructions, surely it was their duty to have verified the validity of the order upon which they were asked to act.

(c) Concealment of material facts

The default judgment, the bankruptcy notice, the extensions of the bankruptcy notice, the orders for substituted service of the bankruptcy notice and the creditor's petition were obtained by the concealment of material facts. Had the Courts known the true facts the various orders obtained by the defendants would never have been granted. The default judgment was obtained by concealing from the Court material evidence without which the Court would not have granted default judgment.

(i) The judgment was obtained in default of appearance of the plaintiff on the return date and it was alleged that the plaintiff did not appear despite being served with the summons. The Court was required to rely on the truthfulness of the affidavit of service and on the honesty of counsel appearing and seeking the order for default judgment.

(ii) The summons was however never served on the plaintiff and this fact was concealed from the Court.

(iii) There was no evidence of service of the summons. This fact was not revealed to the Court.

(iv) There was no endorsement of the service of the summons. This fact too was not revealed to the Court. The affidavit of service on the contrary positively affirmed an endorsement when there was none.

(v) The evidence of the plaintiff in respect of the aforesaid matters was never challenged. The first defendant's then solicitors were not called to rebut this evidence. The defendants offered no explanation either.

…

(d) Failure of the defendants to comply with Practice Direction 1 of 1968

To avoid repetition I do not intend to reproduce the said lengthy Practice Note which has been reproduced in full in Re Aris bin Massod: Ex Parte UOL Factoring Sdn Bhd [1998] 3 AMR 3155 at 3160-1. This Practice Direction sets out the procedure for substituted service in respect of bankruptcy proceedings since neither the Bankruptcy Act nor the Bankruptcy Rules set out the procedure. Practice Direction 1/68 states that in such cases an application must be made to the High Court and it also sets out the number of calls to be made and that the said calls should be made at the defendant's residence, permanent or temporary, or if the claim relates to the defendant's business at his business address. In the case before me there was clearly non-compliance of this direction.

(e) On a default judgment that was not a final judgment

…

… In the case before me the default judgment was never served on the plaintiff, thus giving him no opportunity to set it aside. It is my judgment therefore that the default judgment in this case had not crystallized into a final judgment and that bankruptcy proceedings ought not to have been commenced against the plaintiff.

…

A

… In the case before me, the defendants clearly and unambiguously concede that the summons was not even served on the plaintiff. How then could they obtain a valid judgment against the plaintiff for this Court to even consider the effect of the decision of the Supreme Court in *Adzmi bin Ali & Anor v. Mohamed Isa bin Kasad* [1987] 2 MLJ 199. On the other hand, even if the defendants were to contend that upon the admission of the plaintiff that he owed the first defendant the sum claimed in the bankruptcy proceedings, the first defendant had failed to deny or reject the bill of the plaintiff to the first defendant which was a sum in excess of that claimed by the first defendant and in which case, if the first defendant had through the second defendant served its summons on the plaintiff, the plaintiff would have claimed a set-off or would have counterclaimed. So the mere existence of the debt from the plaintiff to the first defendant does not, by itself, provide a defence to the plaintiff's claims.

B

C

D

(f) Malice

…

It is my judgment that where it is plain that there is a want of a reasonable or probable cause or excuse, it is reasonable to conclude that the defendant could not honestly have believed in the charge he made and this in my view is evidence of malice.

E

…

F

… To my mind the lack of care on the part of the second defendant was sufficient to constitute malice. It is apropos that I cite a passage from *Johnson v. Emerson and Sparrow* [1871] LTR XXV 337 wherein Baron Martin said as follows at page 352:

G

> … I quite agree that if an attorney, knowing a proceeding in bankruptcy to be groundless, presented a petition, either from the motive of gain to himself, or in obedience to the instruction of an oppressive and vindictive client, it would be in law a malicious act.

H

I was referred to another case, namely, *Vijendran Ponniah v. Bank of Commerce* [1999] 5 CLJ 69 wherein on the very same cause of action and on almost similar facts and brought by the very same plaintiff, my learned brother James Foong J in dismissing the action held:

I

A judgment sum stands as a good judgment until set aside. When a judgment sum is not paid, then execution can be enforced. This can take the form of a bankruptcy proceeding. Therefore, there was no sinister reason behind the approach taken by the defendant to commence the bankruptcy proceedings.

Whilst I agree with that view, the facts before me are totally different. Here the defendants knew that the judgment taken was improper and illegal because the summons had not even been served on the plaintiff. This very material fact distinguishes the two cases. Having considered the matter in its entirety I find that the plaintiff had indeed proved his case for civil malicious prosecution against the defendants.

(B) Abuse of Process

…

… Considering the facts of the case apropos to the law as stated, the defendants commenced bankruptcy proceedings for a sum not exceeding half of the amount that was owed by the first defendant to the plaintiff. In my view there was no proper commercial purpose to be served by seeking the plaintiff's bankruptcy and the distribution of his assets. Consequently the bankruptcy proceedings were an abuse of process commenced and maintained to effect an object not within the scope of the process and causing the plaintiff damages. When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process, which is not intended to serve, or which is not capable of serving, its true purpose. In continuing with bankruptcy proceedings, the defendants acted unlawfully, negligently, unconscionably with conscious wrongdoing in contumelious disregard for the plaintiff's rights.

[48] Having made his findings on the facts, the learned trial judge took into consideration the salient factors in the case, as set out at pp. 45 to 49 of the appeal record, to award the damages which he did.

Arguments Before The Court Of Appeal

[49] It was argued on behalf of the second defendant before us that the second defendant had specifically denied any malice in instituting the bankruptcy proceedings against the plaintiff and that

she had reasonable and probable cause in instituting the same and that she did so without malice and in the *bona fide* belief that her firm was discharging its duty as the solicitors for the first defendant.

[50] In support of this argument, learned counsel for the second defendant listed out the following factors:

(i) that the judgment in default was subsisting at the time of instituting the bankruptcy proceedings and even at the time of presentment of the creditor's petition;

(ii) that the second defendant was acting for and pursuant to the instructions of the first defendant;

(iii) that the second defendant had, at all material times, acted without any personal motive or purpose and was merely discharging her duty as solicitors for the first defendant.

[51] On the tort of malicious prosecution, learned counsel for the second defendant stated that it was "accepted that an action lies in respect of the injury to reputation caused by maliciously and unreasonably commencing bankruptcy proceedings against an individual" and that the learned trial judge had indeed "set out the correct principles in his judgment" and that he had "correctly recognized that in order to succeed in a claim for presentation of a bankruptcy petition, a plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, and that they had terminated in his favour and that he had suffered damage."

[52] On the plaintiff's further or alternative claim based on an abuse of the civil process by the second defendant, it was submitted that, on the basis of the authorities cited, there was no such abuse as the bankruptcy proceedings were not instituted for any collateral purpose other than to seek the recovery of the sum being owed by the plaintiff pursuant to the judgment that had been entered against him.

[53] It was submitted that as "the judgment in default obtained on 28 June 1988 had not been set aside, the second defendant as solicitors for and on behalf of the first defendant had reasonable and probable cause to institute bankruptcy proceedings for the recovery of the judgment sum. In this regard, it is trite law that any order or judgment of a competent court is valid and enforceable until and unless it is set aside."

[54] Learned counsel for the plaintiff, in the course of his submissions, took the court through a detailed examination of the evidence adduced during the trial to show that the view taken by the learned trial judge was sound on both the law and the facts and that there had been no serious misdirection on the matter.

Findings Of The Court Of Appeal (Minority)

[55] I agreed with the submissions made on behalf of the plaintiff that the plaintiff succeeded in proving his case based on the causes of action as pleaded. The learned trial judge found as a fact that since the judgment in default which had been obtained by the first defendant against the plaintiff was set aside, "there was no judgment to form the linchpin for the bankruptcy proceedings." He further found that "the entire bankruptcy proceedings were riddled with incurable irregularities" for the reasons stated in his grounds of judgment, as supported by the evidence and not denied by the defendants.

[56] The crux of the defendants' defence was that they had reasonable and probable cause to institute bankruptcy proceedings against the plaintiff as they had a valid judgment at the time of filing the bankruptcy proceedings. The second defendant's additional defence was that the firm acted on the instructions of the first defendant.

[57] When the plaintiff came to know that the second defendant was attempting to serve a bankruptcy notice on him, the plaintiff wrote the letter of 10 December 1992 taking umbrage to such an act and putting the second defendant on notice of the seriousness of that act and the consequences that could flow therefrom. The second defendant did not reply to this letter.

[58] However, the second defendant did transmit this letter to the first defendant for its attention and seeking further instructions. The first defendant responded denying the allegations in the plaintiff's letter but cautioning the second defendant as its solicitors to ensure that all action taken was in compliance with the law. As the second defendant was put on notice in these circumstances that everything may not be hunky-dory in the bankruptcy proceedings, it behoved the second defendant to investigate the matter, notwithstanding the fact that the second defendant had taken over the handling of the matter from the first defendant's previous solicitors.

[59] Furthermore, had the second defendant responded to the plaintiff's letter of 10 December 1992, a reply from the plaintiff might well have disabused the second defendant of the misconception that the judgment in default that had been obtained against the plaintiff was a valid judgment.

[60] In these particular circumstances, I was of the view that the learned trial judge concluded correctly that it was the duty of the second defendant "to have verified the validity of the order upon which they were asked to act." In not doing so, the second defendant acted with such wanton recklessness that it amounted to acting maliciously, as concluded by the learned trial judge.

[61] The learned trial judge correctly found as a fact that since the default judgment was never served on the plaintiff, it had not crystallized into a final judgment upon which to launch bankruptcy proceedings.

[62] Bearing in mind that such proceedings would bring in their wake extremely dire consequences to the party concerned, the second defendant, as responsible advocates and solicitors, should have studied the matter properly before continuing further with the bankruptcy proceedings.

[63] The learned trial judge found that the concealment of material facts by the defendants resulted in the judgment in default being entered against the plaintiff. Again, as the second defendant came into the picture only after the judgment in default had been obtained and, having regard to the plaintiff's letter of 10 December 1992, the second defendant should have been put on notice that the purported debt in the default judgment was certainly suspect. There then arose an obligation on the part of the second defendant to investigate the matter as a responsible firm of advocates and solicitors, particularly so when the client itself, ie the first defendant, instructed as follows in its letter of 14 December 1992 to the second defendant (at p. 596 of vol. 3 of the appeal record):

> …However, please ensure that you as our solicitors complied *(sic)* with the LPA, etc.
>
> …
>
> However if the judgment debtor can proved *(sic)* that he had settled the outstanding sum due to us we shall withdraw the said BN (ie the bankruptcy notice) forthwith.

[64] The above instructions must be viewed against the allegation of the first defendant in the same letter to the second defendant which states:

> … Each time we demand payment the judgment debtor claimed MBf Holdings owed him money which is totally a different subject to us.

[65] The above statements coupled with the strong language used in the same letter by the first defendant should have made the second defendant investigate the matter further, especially since the second defendant had taken over the conduct of the first defendant's claim from the latter's previous solicitors who had entered the default judgment against the plaintiff. Such an investigation would have revealed that the plaintiff's firm itself was awaiting response and/or payment from Carte Blanche (Malaysia) Sdn Bhd, the predecessor company of the first defendant (as distinct from MBf Holdings) of a bill for fees of RM15,000, which sum was almost twice the default judgment sum (please refer to p. 428 of vol. 2 of the appeal record). This would have entitled the plaintiff to plead a counterclaim and set-off in the Magistrate's Court summons as well as in the bankruptcy proceedings.

[66] I was therefore in agreement with the learned trial judge that such reckless conduct on the part of the second defendant in the circumstances which obtained constituted malicious prosecution and was also an abuse of process. In this regard I would, with respect, adopt the dictum of Mahadev Shankar J (as he then was) in *Rohani @ Hamidah binti Nor v. Sincere Leasing Sdn Bhd* [1993] 1 AMR 225 as the correct enunciation of the law on the duty of care imposed on advocates and solicitors in bankruptcy proceedings when he stated as follows at p. 231 of the report of that case, although no doubt made in another context:

> … Bankruptcy proceedings are penal in nature and judgment creditors and their solicitors will be well advised to take note of their responsibility more seriously.

[67] Having the above *dictum* in mind, I refer to the pronouncement of Lord Haldane in the case of *Shearer v. Shields* [1914] AC 808, where he stated as follows at p. 813 of the report of that case:

A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

[68] To my mind, the second defendant may have acted ignorantly but was definitely reckless in the situation which obtained and such action amounted to acting with malice in law although the action of the second defendant could be claimed to be innocent in relation to the state of mind of the second defendant.

[69] For the foregoing reasons, I was of the view that the learned trial judge applied the law correctly to the facts of the case in finding the causes of action against both defendants as having been proved. I would be loth in the circumstances to disturb the findings and the decision of the learned trial judge. I would therefore dismiss the appeal of the second defendant with costs and affirm the decision of the learned trial judge.